THE RECORD
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Association Activities

AFTER CAREFUL consideration at the Stated Meeting on March 8th, the majority report of the Committee on International Law, approving the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the United Nations General Assembly in Paris last year, was approved. Adolf A. Berle, Jr., Chairman of the Committee, and Dana Converse Backus, secretary, explained the position taken by the members who signed the majority report, and called attention to the fact that in recommending approval of the proposed convention "this Association does not construe the omission of political, economic and other groups from those enumerated in the definition of genocide contained in Article II as any direct or indirect indication of the desirability or advisability of such omission, or as direct or indirect sanctioning of the commission of the acts set forth with respect to such other groups."

The minority report, which recommended revision of the proposed convention, was signed by Dudley B. Bonsal, René A. Wormser and Murray C. Bernays. A separate report questioning the impact of the proposed convention on the American constitutional system was also filed by Mr. Bernays.

Also approved at the Stated Meeting was a report from the

Committee on Bankruptcy and Corporate Reorganizations recommending certain revisions in Chapter X of the Bankruptcy Act. Milton P. Kupfer, Chairman, made the report for the Committee.

A joint report from Joseph W. Landes, Chairman of the Committee on Arbitration, and Jule E. Stocker, Chairman of the Committee on Real Property Law, dealing with use of arbitration in connection with commercial and business rent laws of the state also received the approval of the Association. The report is published at page 132 of this issue of THE RECORD.

MORE THAN five hundred members and guests of the Association on March 3rd heard General Dwight D. Eisenhower make a strong appeal for revision of the Armed Services Unification Act to give the Secretary of Defense full authority to act. The General, who recently was recalled to Washington from his post as President of Columbia University to act as Presiding Officer of the Joint Chiefs of Staff, spoke extemporaneously for forty-five minutes, answered questions for ten minutes, then departed for a return plane trip to the Capitol.

While deploring any signs of hysteria over a possible conflict with Russia, the General pointed out that "certain things" had happened in late 1945 that lead to a gradual deterioration in our relations with the Soviets. In the winter of 1945–46 it was becoming plain, he said, that both nations were "watching each other like two lawyers in front of a judge."

The meeting was sponsored by the Committee on Post-Admission Legal Education, of which Cloyd M. Laporte is Chairman, and was preceded by a buffet supper, reservations for which were over-subscribed within forty-eight hours after mailing of the announcements.

ON MARCH 7th the first meeting of the Advisory Committee of the In-Service Training Course for Teachers to be sponsored by the

Association next fall was held. Plans were considered for a course of about fifteen lectures to be given by members of the Association stressing the part the legal profession plays in a democracy with emphasis on the contributions of the bench and the bar. Judge Samuel I. Rosenman, Chairman of the Special Committee on Public and Bar Relations, presided.

The Committee consists of outstanding figures in the educational field, as well as Association members.

A FORUM on socialized medicine, sponsored by the Committee on Medical Jurisprudence, George H. Sibley, Chairman, was held on March 15th. Participating in the forum were Alanson W. Willcox, General Counsel to the Federal Security Administration, who explained the Administration's proposed medical program; Mathias F. Correa, former U. S. Attorney for the Southern District of New York, who discussed the Health Insurance Plan; and Reed B. Dawson, counsel to the Medical Society of the County of New York, who spoke against socialized medicine.

THE COMMITTEE on Federal Legislation, Eduardo Andrade, Chairman, has sent reports to the appropriate committees of Congress indicating the Committee's approval of S. 49 and 50 and H.R. 2051 and 2050. These bills establish uniform qualifications for jurors in the Federal courts and regulate the practice with reference to jury commissions and provide for full time jury commissioners where required. Enactment of these bills, the Committee points out, would carry out the program that was proposed by the Judicial Conference's Committee on Jury Selection in 1947.

The Committee indicated its disapproval of S. 14, a bill which would amend the Administrative Procedure Act. The Committee's objection to the legislation was that the provisions of

the bill were ambiguous and would produce rather than eliminate litigation. The Committee also disapproved S. 23, a bill which would amend the Securities Act of 1933 by eliminating much of the information which otherwise would be required in a registration statement filed by an issuer engaged in the promotion or organization of a new business enterprise.

ON MARCH 8, Frederick vP. Bryan, Chairman of the Special Committee on Military Justice, appeared before Subcommittee No. 1 of the House Committee on Armed Services to present the Committee's view on the proposed uniform code of military justice. Mr. Bryan's formal statement is printed in this number of THE RECORD at page 135.

ON MARCH 23 Joseph J. O'Connell, Jr., Chairman of the Civil Aeronautics Board, spoke before a large audience in the Meeting Hall on Air Mail Rates Under the Civil Aeronautics Act of 1938. This discussion was sponsored by the Committee on Aeronautics, Hamilton O. Hale, Chairman. Harper Woodward was chairman of the subcommittee which made plans for the discussion. Preceding Mr. O'Connell's address a buffet supper was served at which many prominent leaders of the aviation industry were present.

ON MARCH 28 Judge Eugene L. Brisach and Judge S. Samuel Di Falco were the guests of the Special Committee on Round Tables Conferences, Leffert Holz, Chairman. The two judges led an informal discussion on various legal problems.

THE ENTERTAINMENT COMMITTEE, James Garrett Wallace, Chairman, has announced that its Fourth Annual Association Night will be held at the House of the Association on April 6, 7, and 8. This year the Entertainment Committee will present

"Ozark Bride" or "The Lass-oo of the Law," a musicale, lyrical satirical comedy with an all-lawyer cast, under the direction of K. Bertram Friedman and Samuel Ross Ballin. The book is by John F. Devine and Judge Wallace, the music by Bernard R. Lauren and Eugene A. Leiman, and the lyrics by Eugene A. Leiman, Bernard R. Lauren, and Judge Wallace. The performance begins at 8:30 P.M., and refreshments will be served after the show.

Owing to the unprecedented demand for seats, it has been decided to have a matinee performance at 2:30 P.M. on Saturday, April 9.

ON APRIL 12 the Eighth Annual Benjamin N. Cardozo Lecture will be delivered at the House of the Association by The Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States. Justice Douglas will speak on *"Stare Decisis."*

For the information of members interested in procuring the bound volume of last year's Cardozo Lecture delivered by Professor Arthur L. Goodhart on "English Contributions to the Philosophy of Law," this volume can be secured through the office of the Librarian. The cost is $1.50.

APRIL 26 is the opening of the exhibition of members' paintings, sculpture and graphic arts. Cocktails and tea will be served. Indications are that there will be a larger number of pictures exhibited this year than ever before. The opening day of the art show has always been a most pleasant occasion.

ON APRIL 28 the Committee on Foreign Law, John N. Hazard, Chairman, will sponsor a symposium on foreign trade, at which William Harvey Reeves will preside. James G. Mitchell, a member of the Committee, will speak on "World Commerce of

the Future: Intergovernmental Domination or Liberty of Enterprise"; Dr. J. G. de Beus, Alternate Representative for the Netherlands to the United Nations, will talk on "Foreign Trade of the Netherlands"; and Winthrop G. Brown, Director, Office of International Trade Policy, Department of State, has chosen as his topic "The International Trade Organization and its Relationship to Other Aspects of United States Economic Foreign Policy." "Foreign Trade of Latin America" will also be discussed by Dr. Carlos Davila, former President of Chile. The symposium is open to the public and will include a question period.

On MAY 2 the Harlan Fiske Stone Competition sponsored by the Student Moot Court Committee of Columbia Law School will be held at the House of the Association. The panel of judges will be The Honorable Wiley Rutledge, Associate Justice of the Supreme Court of the United States, The Honorable John T. Loughran, Chief Judge of the Court of Appeals of the State of New York, and The Honorable Armistead M. Dobie, Circuit Judge of the United States Court of Appeals, Fourth Circuit. The competition will be open to the public.

The Calendar of the Association for April

(As of March 23, 1949)

April 4 Dinner Meeting of Committee on Copyright
Meeting of Section on Labor Law
Dinner Meeting of Committee on Professional Ethics

April 5 Dinner Meeting of Executive Committee
Meeting of Committee on Unlawful Practice of the Law
Meeting of Section on Wills, Trusts and Estates

April 6 Annual Bar Association Show. Musical Comedy. 8:30 P.M.

April 7 Annual Bar Association Show. Musical Comedy. 8:30 P.M.

April 8 Annual Bar Association Show. Musical Comedy. 8:30 P.M.

April 11 Joint Meeting of Section on Corporations and Section on Drafting of Legal Instruments
Dinner Meeting of Committee on International Law

April 12 Eighth Annual Benjamin N. Cardozo Lecture. *"Stare Decisis."* Speaker, The Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States. *Buffet Supper, 6:15 P.M.*

April 13 Dinner Meeting of Committee on Bankruptcy and Corporate Reorganizations
Dinner Meeting of Committee on Insurance Law

April 18 Dinner Meeting of Committee on Federal Legislation
Round Table Conference. Guest, Hon. John Van Voorhis, Associate Justice, Appellate Division, First Dept.
Meeting of Section on Trade Regulation

April 20 Meeting of Section on Trials and Appeals
Meeting of Committee on Admissions

April 21 Meeting of Section on Taxation
Dinner Meeting of Committee on Municipal Affairs

April 25 Meeting of Library Committee

April 26 Opening of Art Committee's Exhibition of Paintings, Sculpture and Graphic Arts by Members of the Association, 4:30 P.M.
Meeting of Section on Economics of Legal Profession

April 27 Dinner Meeting of Committee on Administrative Law
Meeting of Section on Economics of Legal Profession

April 28 Symposium on Foreign Trade. Auspices Committee on Foreign Law

Current Problems in the Enforcement of the Antitrust Law

By Herbert A. Bergson
Assistant Attorney General of the United States

The Antitrust Division of the Department of Justice is primarily a law enforcement agency. Like all law enforcement agencies, we face difficult and important decisions which in the public interest must be made fairly and enforced vigorously.

There may be times when members of the Bar feel that the element of fairness has been abused. Recently, after the filing of an antitrust action, a lawyer came into my office to complain that we were "picking on" his client. Of course, antitrust laws are not enforced with a view toward "picking on" any industry or any individuals. Our cases and investigations must, necessarily, be carefully selected. Our funds are limited and, therefore, we are unable to strike at all situations which may require action.

The selection of cases depends, in part, upon the personnel available. Naturally, if all of our men are engaged on pending cases and investigations, new matters, unless extremely important, must wait their turn. Let me say here that our accomplishments are attributable in large part to the perseverance and sincere devotion of our personnel to their tasks.

Another important consideration in the selection of a case is the type of commodity involved. The same priority is not given to cases involving pogo sticks, or mink coats, or gold plated bathroom fixtures that is given to cases involving food, housing, or those affecting basic industries.

The type of restraint involved is also a factor in the process of selection. Complaints involving flagrant violations are likely to receive prompt and sympathetic attention.

In selecting cases we analyze the effectiveness of the relief

Editor's Note: This article is an adaptation of a lecture delivered by Mr. Bergson at the House of the Association on February 17, 1949.

obtainable, the competitive positions in the particular industry, and our prospects in the courts. In this respect our decision is similar to that of any businessman who proposes to invest money —he wants to know what the return will be. In antitrust enforcement the return should not be measured in dollars and cents, but in benefits to our economy and our American system of free enterprise.

Problems concerning restraints of trade were considered by the courts long before there were any statutory prohibitions against them. In the early 19th Century the Duke of Brunswick took offense at the publication of a speech containing obscene, vulgar and libelous statements, made by a well-known actor. The Duke, in retaliation, arranged with others for organized groans, hissing and yelling during a performance of "Hamlet" by the actor. The actor brought suit on the theory of a conspiracy to restrain him in the conduct of his chosen profession. The Court held that he had good cause of action and that the alleged provocation was not a defense.

During the time that I have been head of the Antitrust Division, I have heard some groaning and a little hissing and yelling —although it was not organized. Some of this may, at times, be justified and certainly if any lawyer in an antitrust case brought by the Department of Justice feels that he has a legitimate complaint, I want him to come see me. On the other hand, some misunderstanding might arise because of the lack of a clear picture of the basis upon which we determine whether and what kind of a suit should be filed.

The Sherman Act in its present form is, as you know, both a criminal and civil statute. The criminal sanctions are designed to provide punishment for violation. The civil remedies are designed to permit a court of equity to grant the affirmative relief necessary to restore competition and to prevent a recurrence of the illegal activity. Punitive action must be taken where an injunction in a civil case would merely order the defendants to cease violating the law. To enjoin price-fixing arrangements which the courts have repeatedly held illegal *per se,* in many

instances is merely to say, "Don't fix prices any more." In my opinion, most price-fixing cases should be criminal. At times, though, price-fixing situations where an association or an exchange was the medium through which the violation was accomplished are encountered. In some of those cases it is necessary to seek affirmative relief such as dissolution.

Where there is a flagrant and wilful violation of law a criminal action is generally brought. The evidence in every criminal case is carefully studied by me before I'll sign an indictment. I am fully aware of the irreparable harm that can be done by recklessly indicting in Antitrust cases. When I sign an indictment I am convinced that the defendants named therein have wilfully violated the law. Upon conviction in those cases where the evidence shows a wanton disregard of the antitrust laws, I will continue to seek jail sentences.

There are times when both the civil and criminal procedure permitted by the Sherman Act are used. The Congress, in providing criminal and civil procedures in the same statute, intended that they be used concurrently where necessary. In using these concurrent procedures it is not the purpose of the Division to coerce the prospective defendants to consent to a civil settlement on threat of criminal prosecution. However, it is the purpose of the Division, in these cases, to punish the defendants for their past actions, and through the civil case, procure the necessary affirmative relief.

To date there have been 470 criminal cases and 503 civil cases. Many of these criminal cases have been settled by pleas of *nolo contendere*. As far as the criminal cases I file are concerned, there will be fewer settlements by pleas of *nolo*. I have no firm policy against consenting to the entry of *nolo* pleas, and believe that each case should be disposed of according to its own merits. Of course, any action the Antitrust Division takes must be guided by the public interest.

On occasions, as you all know, the Government is asked to do more than to consent to the entry of a plea of *nolo contendere*. It is asked to *nol-pros* the indictment with respect to certain de-

fendants. Again I say, for the reasons that I have outlined above, unless I am convinced by the production of evidence previously not available to us that the defendant should not have been indicted, I will not request that the indictment be *nol-prossed.*

You gentlemen perhaps have heard of the story concerning Lord Chief Justice Holt of England when he was asked to *nol-pros* an indictment. A member of a small band of religious fanatics had been indicted for some infraction of the law. A fellow member of the sect called upon the Lord Chief Justice and said to him, "I come as a prophet of the Lord God who has instructed me to direct you to enter a *nolle prosequi* in the case of my brother." The Lord Chief Justice looked at his visitor and said, "Thou art a false prophet and a lying knave, for if the Lord God had sent thee he would have sent thee to the Attorney General, for He knoweth that it is the Attorney General and not the Lord Chief Justice who may enter a *nolle prosequi.*" Perhaps, gentlemen, this man was not a false prophet after all, for, as you all know, under the new rules of criminal procedure a *nolle prosequi* may be entered only with the consent of the Court.

In determining what is in the public interest we can act only according to our best judgment. Just as any lawyer must exercise his judgment with respect to his client's interest, so we, in handling antitrust suits, must use our judgment with respect to the interest of our client, the public. This judgment, which is based upon experience, is frequently exercised not only in determining whether a *nolo* plea should be accepted but also whether a consent judgment should be entered.

The use of consent judgments in antitrust litigation is not novel. A consent judgment was entered in an antitrust case as early as 1906. When Congress passed the Clayton Act in 1914 it gave its sanction to their use, by making consent judgments inadmissible as evidence in private antitrust suits. Since that time approximately one-fourth of all civil case initiated by the Antitrust Division have been settled by consent.

Consent judgments are affirmative actions which must benefit the public. The relief provided must, in our opinion, be as effec-

tive as could be obtained through trial. A consent judgment which merely enjoins the repetition of the unlawful practices will not be accepted. In consent judgments relief is sought which will entirely dissipate the effects of the unlawful conduct, even if it may require the enjoining of otherwise lawful acts. The Supreme Court has approved the enjoining of lawful act as recently as 1947 in the *International Salt* case.

For example, in the *Stainless Steel* case it was not charged that there was any violation of law in the pricing system used in that industry. However, the consent judgment required that each defendant give the buyer the option of buying f.o.b. mill or at a delivered price which was no greater than the mill price plus actual cost of delivery. This provision was included in the judgment not because it was believed that the pricing system was illegal, but because we were of the opinion that it was the only way in which the unlawful effects of the price-fixing conspiracy could be dissipated.

We do not initiate any negotiations for consent decrees, although we are always willing to listen to reasonable proposals from counsel. Once negotiations have commenced they must be carried on in good faith and not for the purposes of delay. While negotiations are being conducted the trial schedule is kept intact. If no agreement is reached by the trial date, we will go to trial.

Another serious problem, which is encountered in negotiating consent judgments, is the attitude of one or two of the defendants who, though equally at fault, hold out against signing the judgment in the hope that if a judgment is entered against the others the case will be forgotten so far as they are concerned. I want to make it abundantly clear that it is our policy not to accept consent judgments which are not completely dispositive of a case except in unusual circumstances.

One thing noticed in negotiating judgments is that counsel frequently are under the impression that their clients are entitled to provisions and language which have been included in prior judgments. As you know, each industry has its own prob-

lems. Similarly, each antitrust case presents its own individual facts and legal features. Appropriate relief in each case must be considered in the terms of the industry involved and the unique facts presented. For this reason any one judgment, whether entered after litigation or upon consent, cannot be considered as a binding precedent in other cases.

However, certain formal provisions of consent judgments have tended to become standardized because they do not relate to particular conditions in any one industry. One example is the so-called "visitation" provision which permits the Department to examine the files and interview the officers and employees of the defendants, in order to determine compliance with the judgment. The Supreme Court has pointed out, in its decision in the *Bausch & Lomb* case, that the "visitation" provision is a proper means of enabling the Antitrust Division to obtain this information. The "visitation" section also requires the defendant to submit reports on matters contained in the judgment.

Another example of a provision which has become standardized is that by which the court reserves jurisdiction to enable any of the parties to the judgment to apply for any order necessary for construction, modification or enforcement. This provision expresses the inherent power of a court of equity to inquire into the operation of a judgment which enjoins future conduct. It is also standard practice to provide that the consent judgment shall apply to subsidiaries of the defendant, its successors, and their officers, directors and agents. This provision is intended to cover possible evasion by the obvious subterfuge of causing others in lieu of the defendant, to perform acts prohibited.

Many of our consent judgments deal with patent problems. I think it clear that where patents have been abused the patent owner is no longer entitled to the monopoly granted by the patent laws. In these situations the public should have the unrestricted use of patents. Provisions have been included in several of our consent judgments requiring the compulsory licensing of patents without restriction to all applicants.

The right of the Government to obtain this relief was estab-

lished by the Supreme Court in the *Hartford-Empire* and *National Lead* cases. In those cases compulsory licensing at reasonable royalties was required.

After the decision in the *Hartford-Empire* case protracted hearings were conducted before a master in chancery in order to determine what constituted a reasonable royalty. This procedure was time-consuming and expensive both to the Government and to the defendants. To eliminate this, judgments are now drafted to encourage the defendant and the applicant for a license to determine, between themselves, a reasonable royalty. In the event of failure of the parties to negotiate a reasonable royalty they have recourse to the courts.

In some cases where the patent abuse has been aggravated, or where more far-reaching relief is required, it is felt that compulsory licensing at reasonable royalties is inadequate, and that the defendants should be required to license their patents royalty-free. As a result, the Antitrust Division, in appropriate cases, has entered consent judgments requiring compulsory royalty-free licensing. These include judgments entered in cases involving color motion picture film, automotive air breaks, cast iron pressure pipe, plastics, and railway spring products. In the consent judgment entered last October in the *Libbey-Owens-Ford* case involving flat glass products, royalty-free licensing of almost 200 patents was required, while compulsory licensing at reasonable royalties was required in over 700 patents. The purpose of a judgment provision of this type is not to punish the patent owner, but to assure the public of relief necessary to restore competitive conditions in the industry.

Consent judgments have always presented problems of compliance and enforcement. Considerable time and effort is spent in negotiating and writing a judgment so that the relief obtained is feasible and workable. Failure to police these judgments, may mean wasted time in investigating the violation, bringing the case and negotiating the judgment. And, in any event unless there are complaints it is not known whether a particular judgment is being lived up to by the industry. To meet this problem,

the Antitrust Division has assigned a number of attorneys to study compliance with judgments. As you know, violation of a judgment is a contempt of court. Unfortunately, because of the lack of funds, there have been few of these contempt actions. The last such action was in 1946. Since that time complaints of violation of judgments have been received and it is expected that some contempt cases will be filed this year.

In the patent field there has been beneficial relief through negotiated judgments. This has resulted from a program which the Antitrust Division undertook in 1939, to clarify the law in order to prevent the illegal use of patents to suppress invention and to foster monopoly. A large number of cases were started and several have been finally decided by the Supreme Court. Most of the issues which the Antitrust Division believed needed clarification have since been decided. There is now a substantial body of law with which to work. You, as attorneys, and your clients, as businessmen, can resort to these principles for guidance. In this field there is no longer any need to chart your course by reference to a few isolated decisions.

I wish to emphasize that the Antitrust Division is not anti-patent. We are fully aware of the important contributions the patent system has made to this country's development. Patents have a legitimate and important place in our economy. However, we should not be blind to the ways in which they may be misused.

I believe that improper patent practices fall into three main groups. These are: (1) the imposition of restrictive conditions upon a license by a patent owner; (2) restrictive agreements between competitors in the interchange of their respective patent rights, sometimes through bi-lateral agreement, sometimes through the use of the so-called "patent pool"; and (3) the concentration of patents in a given field in the hands of a single owner.

The third category is one of the important patent problems on which there is little law. The concentration of patents in the hands of a single owner may result, in part, from the practice of

licensing patents only on the condition that the licensee assign back to the patentee any improvement he develops. There is danger that this practice may discourage research because the dominant patents make it impossible to use improvements even if they are developed. The *National Lead* and the *Carboloy* cases give considerable support this theory. Furthermore, the dominant patent-owner might have the best, or perhaps the only, market for the independent inventor's patents.

The importance of patents and technology to modern business is a well-established industrial fact. The interchange of technology and patents between producers may destroy the stimulus of competition. Pooling of patents and technology by competitors for the purpose and effect of eliminating competition is of course always illegal. One of the illegal aspects of a patent pool is the use of the combined knowledge and patent power against non-members of the pool.

We have already discovered that we cannot stop with the elimination of patent abuses. We must attack this problem at its source—the restraints in and monopolization of industrial research and scientific knowledge. As one important research man is reported to have said, "Competition begins in the laboratory." Monopoly of technology is as significant as a monopoly of raw materials.

Scientific research has become our greatest natural resource. We are now living in an age in which scientific research and technology are giving us the industries of the future and providing the backbone of our national defense and prosperity. Accordingly, restraints at the research level, such as divisions of fields of invention, must be eliminated in order to keep newly emerging industries free and competitive, and to prevent the formation of entrenched monopolies in the end products.

At or about the time that the Department began its intensified activity in the patent field, the problem of cartels received similar attention. Here the legal problems were not great. The antitrust laws clearly prohibit restraints upon the foreign trade of the United States. Our objective was and is to effectuate this pro-

hibition. Our cases demonstrated that cartels are largely an extension of domestic monopolies into world trade, and an integral part of the monopoly problem at home. This problem will receive our continued and intensified attention.

The Antitrust Division is aware that cartels are now being regrouped and reformed and are planning to resume their activities. We know that there are domestic monopolies which still cling to the protective covering of international cartel agreements for maintenance and protection. In the past, cartel agreements by limiting production of critical materials have jeopardized the very foundation of our foreign policy and military security. Our purpose is to see that this does not happen again.

Many cartel agreements involve bilateral or unilateral arrangements between competitors whereby each grants the other a license, usually exclusive, under its patents. The agreements generally include territorial limitations and an undertaking to license future improvements, exchange know-how and render other technical assistance. As a result, the American company no longer sells in Europe or Asia or whatever territory has been allocated to the foreign cartel partner. The foreign producer can no longer sell in the United Sttes. The Supreme Court had no difficulty in the *National Lead* case in declaring these activities unlawful.

Today, any discussion of cartels must necessarily include a consideration of the "bold new program" announced by President Truman. In his inaugural address he said:

> " * * * we must embark on a bold new program for making the benifits of our scientific advances available for the improvement and growth of underdeveloped areas.
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> * * * *
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> "With the cooperation of business, private capital, agriculture and labor in this country, the program can greatly increase the industrial activity in other nations and can raise substantially their standards of living."

In this connection I have noticed in a recent article in the

New York Times that a British-Indian industrial team has already arrived for "know-how" training in this country. Six Indian engineers are to receive intensive three months' training in making chemical fertilizers. After this training program the Indian engineers will eventually operate a Government-owned fertilizer plant in India.

It is gratifying to see this quick response to the program of the President. This program is designed to fight communism. I agree that the best way to fight communism is to prove to the nations of the world that our system of free enterprise is superior. In undertaking this program we cannot allow it to become entangled with cartels, for they are inconsistent with the philosophy of free enterprise.

Here is presented the opportunity for capitalism to demonstrate to the world the vigor, ingenuity and capability of our American system of free enterprise. If we allow that system to be compromised by illegal cartel arrangements, there is a danger that we shall provide ammunition for the communistic propaganda that we are merely seeking dollars.

Another fairly recent enforcement problem is the relation of trade-marks to the antitrust laws. There is some indication that trade-marks will be more important in the future. As international trade increases, the problems attending the concurrent use of the same mark by potentially competitive producers in different territories, also increase. This practice has been common in international cartel arrangements. In addition, modern advertising methods give to trade-marks a significance and value far beyond what they have possessed in the past.

At the outset, it is important to distinguish trade-marks from patents and copyrights. A trade-mark properly used, performs only a commercial function of identification. A patent carves out a monopoly from which all except the patentee are excluded.

Misuse of trade-marks in the antitrust sense falls into two main categories. First, trade-marks may be used directly to eliminate competition through the imposition of quality restrictions, field restrictions, divisions of territory, price restrictions, as a result

of improper resale price maintenance activities, and other methods. Secondly, by attempting to maintain exclusive rights in the name given to an article on which patents have expired trademarks may be used to perpetuate monopoly.

Our problem is to put an end to these types of misuse. The problem is complicated by the fact that, at the same time, we must avoid injury to *legitimate* business interests. The contention is frequently made that destruction of the exclusive right in a name constitutes a deprivation of property. There seems to be little merit to this contention. In the first place, it is recognized that antitrust defendants may be deprived of their property if this is reasonably necessary to restore competition. Secondly, by analogy to the *Morton Salt* doctrine in the patent field, the "property" in a trade-mark may be forfeited as a matter of common law as a result of its misuse. This concept has been incorporated into the Lanham Act which makes use of a mark to violate the antitrust laws a defense in an infringement suit.

Inasmuch as we have pending cases involving matters of trademark relief, it would not be appropriate to discuss in detail the various types of relief needed to meet these situations. I may point out, however, that, in urging trade-mark relief, our basic objective is to correct the monopolistic or non-competitive situation, not necessarily to penalize the trade-mark owner or deprive him of his "property." In other words, trade-mark relief is tailored to the facts of the case.

Another important monopoly problem is the elimination of competition through mergers and asset acquisitions. Section 7 of the Clayton Act was designed to forbid the acquisition by one corporation of the stock of competing corporations where the result would be substantially to lessen competition. In 1914 when the Clayton Act was passed stock acquisition was the usual device for effectuating mergers. Today the prevalent merger device is asset acquisition. The Supreme Court has held that Section 7 of the Clayton Act does not prevent the acquisition of assets, nor does it provide authority for the Federal Trade Commission to order divestiture of assets acquired as a result of an

illegal acquisition of stock. Thus, two loopholes exist by means of which the basic purpose of Section 7, to arrest the creation of monopolies, is defeated.

Since 1929 the Federal Trade Commission has unsuccessfully urged the Congress to amend the Clayton Act to prohibit certain acquisitions of assets as well as stock. This year the President mentioned this problem in his State of the Union message and urged the Congress to cure the anomalous situation.

The Antitrust Division has attempted to aid in the solution of this problem by scrutinizing pending mergers to determine whether they involve antitrust problems. Through the cooperation of the members of the Bar this so-called merger program was highly successful—that is, until the *Columbia Steel* decision. Frankly, we are still scrutinizing pending mergers and when the right case comes along we expect to give new life to our merger program. I believe that in the future the *Columbia Steel* decision will be narrowly construed. In any event, I believe that Section 7 of the Clayton Act should be amended.

The *dicta* in the *Cement* case have created some confusion and uncertainty with respect to basing points and delivered pricing methods. In that case, so far as the Federal Trade Commission Act is concerned, the Supreme Court affirmed the ruling of the Federal Trade Commission that the cement producers violated that Act when they agreed among themselves to use a delivered price, multiple basing point system, the effect of which was complete suppression of all price competition in sales of cement. That is all the Supreme Court held in the *Cement* case respecting the Federal Trade Commission Act and that holding merely reaffirmed a well-established principle.

The opinion of the Court, however, contains *dicta* to the effect that conduct which falls short of being a violation of the Sherman Act may constitute an "unfair method of competition" prohibited by the Federal Trade Commission Act and that the existence of a "combination" is not an indispensable ingredient of an unfair method of competition under the Act.

It has been asserted that these *dicta* set forth an interpretation

of the Trade Commission Act which would empower the Commission to outlaw freight absorptions or sale at delivered prices by a seller acting independently.

The *Cement* case also deals with Section 2 of the Clayton Act. In respect to that Act the Court again merely reaffirmed prior decisions in holding that sales at delivered prices computed with reference to a basing point distant from the seller's factory may constitute an illegal price discrimination if the required detrimental effect on competition is present.

The difficulties occasioned by the Court's opinion on this phase of the case are no different than those presented under the Federal Trade Commission Act. The holding of the Court was merely that the price differentials which resulted from adherence to the system could not be defended as having been made in good faith when in fact they were made as a result of agreement. However, some people have concluded from some of the language used by the Court that pricing differentials are illegal even in the absence of agreement and that as a practical matter the only method of pricing safe against proceedings under the Act is on an f.o.b. mill basis.

While I believe that this uncertainty and confusion is greatly exaggerated, it may have been emphasized by the recent holding of the Court of Appeals for the Seventh Circuit in the *Rigid Steel Conduit* case. In that case the Court affirmed a holding of the Commission that the concurrent use of a formula method of making delivered price quotations with the knowledge that others did likewise, and with a resulting absence of price competition among the sellers, was an unfair method of competition under the Federal Trade Commission Act. That case is now pending in the Supreme Court.

The Johnson Committee has already held hearings on a bill, to amend the Federal Trade Commission Act and the Clayton Act in such a way as to dissipate the *dicta* of the Supreme Court in the *Cement* case and overrule that aspect of the *Rigid Steel Conduit* case which holds illegal uniformity of action based upon knowledge that others are following the same course.

I have opposed the enactment of this bill for several reasons. Primarily, I believe that it is undesirable for the Congress to legislate on this question while it is currently before the courts. In my opinion, the Congress could more clearly determine the areas and need for legislation after the Supreme Court has acted in the *Rigid Steel Conduit* case.

There has been some mention of the possibility of procuring *status quo* legislation until the Supreme Court has passed upon the *Rigid Steel Conduit* case. I would be inconsistent if I were to oppose such legislation and at the same time urge that the Congress await action by the Supreme Court. However, such *status quo* legislation should be carefully drawn so that those pricing systems which are clearly unlawful are not temporarily legalized.

In speaking of legislation there are a few amendments to the antitrust laws that I believe would be beneficial. First, let me say that as far as the Sherman Act is concerned I do not believe it requires affirmative amendment. By that I mean that it does not appear necessary or desirable to add to the Sherman Act. The generality of that statute admirably permits adaptation to continually changing practices and methods.

However, there are certain negative amendments which would be helpful. There has been a tendency to whittle away the antitrust laws by statutes granting immunity to particular segments of the economy. The withdrawal of some of these exemptions to the antitrust laws would, in my opinion, be most beneficial. Foremost among these I would favor repeal of the Miller-Tydings amendment to the Sherman Act, which legalizes resale price maintenance contracts in interstate commerce where such contracts are authorized by State law. This amendment was passed and sent to the White House on the last day of the legislative session as a rider to the 1937 District of Columbia Appropriation Act. In signing it President Roosevelt described this method of enactment as a vicious practice and expressed the hope that the bill "will not be as harmful as most people predict."

Today, twelve years after the enactment of the Miller-Tydings amendment, so-called fair trading is permitted in forty-five States.

That it has resulted in higher prices can readily be seen by a comparison of District of Columbia and neighboring Maryland drug prices. According to a recent article in Fortune magazine entitled "The Not-So-Fair-Trade Laws" a large tube of Barbasol costs 29 cents in the District and 39 cents in fair trade Maryland. Similarly a bottle of Old Grandad costs $5.45 in Washington and $6.65 before State tax in Maryland. It has been estimated that from ten to fifteen per cent by dollar volume of all the sales of department stores are "fair traded" price-fixed articles.

Price competition is vital to our economic well-being. The legal sanction of price fixing tends to undermine the basic tenets of a competitive economy. It creates a disturbing conflict between legal price fixing and the general price fixing inhibitions of the Sherman Act. This can be seen in the comments of Judge Knox in connection with sentencing in the *Carboloy* case. Judge Knox said:

> "I sometimes do not altogether understand the philosophy of the law with respect to concerted action having to do with prices. We have the Sherman Act on the books and I am called upon from time to time to interpret it, but here is Congress authorizing the State of New York to fix prices at which various things shall be sold by understanding and agreement, and I don't know where the line should be drawn. I know that various articles that I have occasion to buy, the price is fixed with the sanction of the law. Yet here is a case where we have no such sanction."

I understand that because of resale price maintenance contracts many independent retailers, particularly in the electrical appliance field, are faced with a dangerous situation. Some of these dealers are finding it difficult to move various appliances which are now being superseded by new models. Under ordinary circumstances they would conduct a sale and reduce prices sufficiently to dispose of these items. In some instances this is impossible because of fair trade contracts, many of which contain liquidated damage provisions subjecting the retailer to damages of $500 for each violation. Should there be a general decline in

business and these dealers caught with large inventories, many may be unable to survive.

The attempts to whittle away the antitrust laws by special legislation are exemplified by the enactment of the Reed-Bulwinkle bill which I believe should be repealed.

With regard to the future, it is our purpose to intensify our activities against monopolies and attempts to monopolize. In this connection, we have encouraged the application of the remedies of divestiture and divorcement. We believe that where appropriate these remedies are the most expeditious means of eradicating the economic consequences of monopoly.

In addition, we shall continue our efforts to prosecute illegal conspiracies in food, clothing and housing. We shall also bring selected cases involving restraints wherever the facts justify.

Because the problems of antitrust enforcement are numerous, I have been able to mention briefly only a few. The interest of the Bar in these problems is significant. For in my opinion, insofar as the antitrust laws are concerned, the Bar faces a challenge today—a challenge that is intimately related to our American way of life. We must not allow our system to be imperiled through ignorance or disregard of the antitrust laws.

The American people and the enlightened leaders of American business are determined that we shall preserve the fundamental principles of free enterprise.

There are encouraging signs of the role the lawyer is playing in performing this vital task. For example, in a recent case counsel indicated to us that he thought the Antitrust Division was right—that, of course, is always gratifying—and that he personally intended to give a series of lectures to the officials of the defendant company so that they would understand the meaning of free enterprise in the terms of the Sherman Act.

This is the spirit which will enable us to maintain our vigorous economy.

The fact that the lawyers of America are concerned about these problems will, I believe, preserve and nourish our capitalistic system.

Committee Reports

COMMITTEE ON ARBITRATION
COMMITTEE ON REAL PROPERTY LAW

JOINT REPORT ON USE OF ARBITRATION UNDER COMMERCIAL AND BUSINESS RENT LAWS OF NEW YORK AND PROPOSED AMENDMENTS*

Under Section 4 of the Rent Laws affecting Commercial and Business space in New York City (McKinney Unconsolidated Laws, Secs. 8524 and 8554), reasonable rent exceeding the "emergency rent" may be fixed by arbitration or by the Supreme Court or, provided the tenant occupied the space on the effective date of the Statute, by agreement which must contain certain provisions including an escape clause whereby such a tenant may cancel within sixty days. Where such reasonable rent may not be fixed by agreement, resort has been had almost invariably to arbitration rather than to proceedings in the Supreme Court. Such arbitrations, especially those involving a prospective tenant not yet in possession, tend to become merely *pro forma* proceedings and have become the subject of abuse, with the result that arbitration generally may be brought into disrepute. The purpose of this joint report is to suggest a remedy whereby the temptations to abuse are removed and genuine arbitrations of reasonable rent may be continued.

Because of the recognized shortage of space, prospective tenants, generally, agree in advance to rents in excess of the emergency rent and to arbitration of the "reasonableness" of the rent by an arbitrator who is almost always selected by the landlord. Upon the hearing the prospective tenant may not even appear and in any case almost never produces evidence, and may even consent in advance to the confirmation of a predetermined award. There are numerous instances where no lease is delivered and where possession is withheld until the award is confirmed. Execution of a lease, submission to arbitration, the arbitrator's qualification, the hearing, and the rendition of the arbitrator's award, may all occur on the same day. Thus, though the forms of procedure under Article 84 of the Civil Practice Act may be followed, there is in such cases no arbitration of a genuine dispute as to the reasonableness of the rent to be charged. Obviously in such cases the prospective tenant either is in no position to contest or does not wish to contest the so-called issue, namely, the determination of reasonable rent.

The abuse has long been recognized. In the report of the Joint Legislative Committee dated March 20, 1946, attention was called to the undesirable practice of selecting arbitrators associated in interest with the owners. The Legislature attempted to correct the abuse by requiring minutes of the hearing before the arbitrator to be filed on a motion to confirm (Laws 1947,

* This report was approved by the Stated Meeting of the Association on March 8, 1949.

Chapter 822). Unfortunately, this amendment failed to correct the abuse and the courts have in several instances set aside awards where there have been no genuine arbitrations and have characterized such arbitrations as a "farce" or an "idle ceremony." In *Matter of Viro Realty Corporation,* 297 N. Y. 871 (1948), the Court of Appeals affirmed without opinion an order of the Appellate Division 272 App. Div. 1014 (1st Dept. 1947), vacating an arbitration award on the ground that the arbitration was purely *pro forma* and that the procedure was violative of declared public policy.

Many arbitrations, however, are undoubtedly carried out within the purpose and spirit of the statutes which were intended to protect tenants against overbearing on the part of landlords. Where an agreement is not permitted, neither landlords nor tenants ordinarily wish to rely on the expensive and protracted procedure of a Supreme Court litigation when arbitration is available. It would therefore seem that the remedy is not to eliminate arbitration provisions which are far less expensive and time-consuming than judicial proceedings and also relieve the courts of a heavy burden provided the temptation to abuse the process of arbitration can be removed.

The basic evil is that practically all arbitrations of reasonable rent under these statutes are uncontested and are at best the equivalent of an inquest. But the realities must be recognized and no legislative fiat can compel a prospective tenant to enter into a dispute with his prospective landlord. If the prospective tenant finds space at a rent which he is able and willing to pay, he will retain counsel, hire experts, and spend time and energy necessary to prove or disprove the fairness of such rent when he does not have the protection which the emergency laws provide for tenants in possession. Yet the fact that these prospective tenants do not dispute the fairness of rents should not deprive those in possession of the advantages of arbitration as distinguished from court proceedings.

The primary purposes of the statutes, namely, protection of tenants against unreasonably high rents and also protection of tenants' possession are inseparable and must be preserved. Tenants already in possession can and do protect themselves under the existing laws, because their right to possession continues notwithstanding the expiration of their leases.

Those in possession on the effective date of the law may agree, without arbitration or application to the court, on a reasonable rent. Those now in possession who entered into possession after the effective date of the laws are, however, denied the right to make an agreement, although fully protected in their possession on the expiration of their leases. It is believed that it would be fair if all tenants, whether or not in possession, are permitted to make such agreements provided their right to possession is protected.

It is the recommendation, therefore, of the Real Property Law Committee and the Committee on Arbitration that the present provisions of the Commercial and Business Rent Laws permitting arbitration be continued except as to tenants not in possession and that the provisions authorizing agreements between landlord and tenant fixing such rent (together with provisions for sixty-day "escape clauses") be extended to include not only tenants in possession on the effective date of the original rent control laws but all other

tenants as well. Such agreements might provide for arbitration of the reasonable rent in the event that the tenant elects to cancel within sixty days after the signing, or in the case of a new tenant (i.e., those not in possession at or immediately prior to the execution of the agreement) within sixty days after possession is obtained; provided that the arbitrator is not designated prior to cancellation and thus is not pre-selected by the landlord. This we believe will adequately protect all tenants in accordance with the purpose and spirit of the statutes. As correlative protection to the landlord it is the further recommendation that if the "escape clause" be availed of by a new tenant he may be entitled to remain in possession only if he pay the emergency rent to the landlord and deposit the difference between such emergency rent and the agreed rent in the Supreme Court on the first of each month thereafter until the fair and reasonable rent shall have been determined by arbitration or, on the application of either landlord or tenant, by the Supreme Court. By such amendment the inducement to abuse is removed, tenants not wishing to dispute the rent are not required to do so, while at the same time preserving such right for a period of sixty days during which they may repent any hurried decision, and landlords as well as tenants are protected against overbearing on the part of the other.

This report was not adopted unanimously by the Committee on Real Property Law.

The following resolution will accordingly be submitted to the Association

RESOLVED, that the report of the Committees on Arbitration and Real Property Law on use of arbitration under commercial and business rent laws of New York, as submitted to this meeting, is approved, and said Committees are authorized on behalf of this Association to take such steps as they may deem advisable to promote the enactment of the changes in such laws recommended in the report.

Respectfully submitted,

COMMITTEE ON ARBITRATION

JOSEPH W. LANDES, *Chairman*
IRVING T. BERGMAN
THOMAS BRESS
JOHN S. CHAPMAN, JR.
EDWARD L. COFFEY
EZRA CORNELL
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SAUL ZOLOT

COMMITTEE ON REAL PROPERTY LAW

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LEWIS ORGEL
ARAD McCUTCHAN RIGGS
HERMAN T. STICHMAN
EDWARD WEINFELD
HERBERT A. WOLFF

March 1, 1949

SPECIAL COMMITTEE ON MILITARY JUSTICE

STATEMENT BY FREDERICK vP. BRYAN, CHAIRMAN, SPECIAL COMMITTEE ON MILITARY JUSTICE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, BEFORE SUBCOMMITTEE NO. 1 OF THE HOUSE COMMITTEE ON ARMED SERVICES ON MARCH 8, 1949.

As Chairman of the Special Committee on Military Justice of The Association of the Bar of the City of New York, I appear before your Committee on behalf of that Association. The Association is the senior bar association of New York, and has a membership of 4,750 lawyers.

The Association, through its Military Justice Committee, has made a thorough study of the court-martial systems of the Armed Services, and has followed carefully the progress of the proposed reforms which have been before the Congress. As lawyers, we are deeply concerned with the administration of justice as it affects millions of young Americans. Nonetheless, we are fully cognizant of practical military necessities and requirements and well aware that we are dealing with military justice and not with justice in the abstract.

We do not believe that the need for extensive court-martial reform is any longer seriously questioned. All boards and agencies which have made a study of the subject are in agreement on this score, and discussion with great numbers of Army and Navy personnel, both officers and men, who were familiar with the court-martial system completely confirms that view. The question before your Committee is, therefore, whether or not the proposed unified code of military justice accomplishes the reforms of the system which are essential.

The term "military justice" should not be an anomaly, for there is nothing inconsistent between the word "military" and the word "justice." What is required is a system which administers justice with fairness and objectivity and with full protection for the respective rights of the accused on the one hand and the prosecution on the other. A system which achieves this inspires confidence in the personnel whom it governs and tremendously heightens their morale. A system which fails to do so can only result in the lowering of morale and is unworthy of the American tradition.

We are happy to be able to say that H.R. 2498 goes a long way toward accomplishing this objective and is a great improvement on previous legislation of this character. The Committee which drew the uniform code of military justice and its staff are to be highly commended for the work they have done, particularly in view of the delicate balance required to meet the varied views of the three Armed Services.

We believe that H.R. 2498 is a very able and well drawn piece of legislation. Speaking generally, it provides a clear, workable and uniform code for the administration of military justice and in this respect alone fulfills a long-felt need. Furthermore, it makes a large number of important changes which

will improve the administration of military justice in many major respects. It has also clarified and arranged in orderly fashion a whole mass of provisions which were difficult to understand and often obscure.

I wish we could go farther and say that this bill presented the ultimate answer to the problem of military justice reform. Unfortunately, we cannot say that, for the reason that, as I will point out later, the bill is deficient in one vital respect, which affects the heart of the whole matter. However, the bill as a whole is a good one as far as it goes, and I want first to mention a few specific examples of its many excellent features.

One major criticism levelled at the old system of military justice was that the rights of the accused were all too frequently prejudiced because of the lack of capacity of defense counsel. The proposed bill corrects this situation by requiring in Article 27 that both trial counsel and defense counsel in general courts must be fully qualified specialists in the law, and in special courts that the defense counsel have the same qualifications as the trial counsel. These provisions greatly strengthen the system by protecting the essential right of the accused to have his case fully and competently presented.

The salutary provisions of Article 38, Sub-division c, permitting the filing of briefs by defense counsel for consideration by the reviewing authority, should also be noted.

Articles 26 and 51, prescribing the qualifications and duties of the law officer of the court, are particularly sound. The law officer, who must be a fully qualified lawyer, becomes in effect a judge, with the power to determine all questions of law during the course of the trial on the basis of his specialized knowledge. The lay members of the court perform the functions of a jury, and pass upon the facts under appropriate instructions from the law officer. This is a proper separation of the judicial function and the fact-finding function, which should prevent overreaching by the President and lay members of the court and make for a record which is susceptible of intelligent review. We heartily endorse these provisions.

The provisions of the proposed code as to review are in general good, and represent a great improvement over the cumbersome review machinery provided by the Elston act. While we differ on such details as the right of the Judge Advocate General to refer a case for reconsideration to another Board of Review, if dissatisfied with a decision (Article 66e), nevertheless the review provisions provide a proper and appropriate method for review of the trial record. Boards of Review are properly given the power to consider weight of evidence.

We particularly commend the provisions as to the judicial council. Such a body, tantamount to a Supreme Court of military justice, has long been necessary. The qualifications of its members and the prerequisites and compensation granted them will, we hope, ensure that it will be composed of men of judicial calibre. It will be able to establish a body of case law, which will implement the provisions of the code and furnish general standards for the administration of justice in the various types of situation with which courts throughout the Armed Services are confronted. It should also afford a great measure of protection against abuses of the system.

The annual survey of the operation of the code made by the judicial council and the various Judge Advocates General should be most useful in securing uniformity on questions of policy and in the development and improvement of the machinery of justice.

These are but a few of the many excellent provisions of H.R. 2498. However, we cannot give any unqualified endorsement to this bill when it has failed to remedy the most important single defect in the old system.

The major criticism of the system of military justice as it operated during the war was that the courts which tried the accused were subject to the influence, if not the control, of command, and such influence or control was frequently exercised. As stated in the report of the War Department Advisory Committee on Military Justice, dated December 13, 1946, at pages 6 and 7:—

> "The Committee is convinced that in many instances the commanding officer who selected the members of the courts made a deliberate attempt to influence their decisions. * * * Not infrequently the members of the court were given to understand that in case of a conviction they should impose the maximum sentence provided in the statute so that the general, who had no power to increase the sentence, might fix it to suit his own ideas."

A system of "justice" in which there is placed in a single individual the power (a) to order the arrest of an individual; (b) to prefer charges against him; (c) to appoint counsel for both defense and prosecution; (d) to appoint the trial court from among persons who are subject to his control or domination; and (e) to review the decisions of such courts, is abhorrent to every concept of American justice. For when such power may be wielded, the temptation is almost irresistible, however well-intentioned the motives, to use it to influence or control decisions as to guilt or innocence, and as to sentence.

There is only one way to prevent the frequent exercise of such power and that is to remove from command the power to control or influence the courts.

We agree that maintenance of discipline is a function of command. But there is a clear distinction between the right of command in the exercise of that function, to order an accused to trial and control the prosecution (which are undoubtedly command functions), and the right or power of command to influence the court in determining the guilt or innocence of the accused and the sentence to be imposed upon him. The latter are powers which command in theory expressly disavows and should never exercise. Command must be prevented from exercising them in the future as it has in the past.

This can be easily accomplished without withdrawing from command a single power necessary for the maintenance of discipline. The commander must retain the power to prefer charges, to refer them for trial, and to control the prosecution of the case. But once the case has been referred for trial, then the processes of objective justice should be free to operate. This is the line of division, and from this point forward an independent judicial arm of the Service should be responsible for seeing that justice is done.

This judicial authority should convene the court, and appoint its members. It should also appoint defense counsel. The members of the court should be appointed from panels selected by commanders and submitted to the convening authority. The convening authority should be on a sufficiently high level so that the panels will afford a wide range of selection, and, in the cases where justice requires, a court may be appointed, composed of officers and men from units other than that of the accused.

When a case has been decided, the record should pass to the judicial arm for review, subject only to the right of the commander to exercise clemency or remit the sentence.

The proposed uniform code of military justice draws no such line of division. It leaves in the hands of the commander all of the powers which enable him to influence or dominate the court, and thus perpetuates the major evil of the old system. This is the opportunity to correct this evil, and to make the excellent proposed code into legislation which will complete the reform of military justice which has so long been necessary.

It must be remembered that the American Armed Services in time of war and now in time of peace are citizen Armed Services. Their fighting capacity is dependent upon their morale. Morale will never be so high as when the individual solider, sailor or airman is convinced that he will get a square deal under a system of justice which is in accord with his traditional philosophy of what justice should be.

We urge upon this Committee the passage of the proposed uniform code of military justice embodied in H.R. 2498, modified only by provisions necessary to withdraw from command the power to influence or control the courts. This nation will then have a system of military justice which should ensure to the members of its citizen Armed Services equal justice under law which is the right of every American.

The Library

SIDNEY B. HILL, *Librarian*

SELECTED LIST OF MATERIALS ON JURIES

> "If we are to admit that the idea of trial by jury is wrong, then by the same token we must admit that whole system of self-government is wrong."

While the jury system has had a distinguished and firmly established place in the administration of justice, it has not been free from attack. Today new tests and pressures are being applied from many quarters. The recent litigation in both the federal and state courts dealing with "Blue Ribbon Juries" emphasize the importance of the jury trial in the judicial process. An English jurist in a stimulating essay has called our attention to one aspect of the jury services, "Little has been written of its burden or its training; its consumption of time and energy, its responsibility and danger; how through it men were thrust into the very arcana of the judiciary, and forced to become fact finders, judges, in the most important crises of one another's lives."

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